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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **OAKLAND DIVISION**

19 IN RE ABBOTT LABORATORIES NORVIR
20 ANTITRUST LITIGATION

No. C-04-1511 CW

21 **PLAINTIFFS' MOTION PURSUANT TO**
22 **CIVIL L.R. 79-5(d) TO LODGE UNDER**
23 **SEAL AND REQUEST TO UNSEAL**

1 TO DEFENDANT AND ITS ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN that Plaintiffs John Doe 1 and the Service Employees
3 International Union Health and Welfare Fund ("Plaintiffs") will and hereby do request under Civil
4 Local Rule 79-5(d) permission to lodge under seal the unredacted Declaration of Michael W. Stocker
5 in Support of Plaintiffs' Opposition to Defendant Abbott Laboratories' Motion for Summary
6 Judgment, and Cross-Motion for Summary Judgment on Abbott's "Patent Immunity" Defense
7 ("Stocker Declaration"), together with exhibits to that declaration; an unredacted version of
8 Plaintiffs' Opposition to Defendant Abbott Laboratories' Motion for Summary Judgment, and Cross-
9 Motion for Summary Judgment on Abbott's "Patent Immunity" Defense ("Plaintiffs' Opposition");
10 and an unredacted version of the Declaration of Douglas F. Greer, Ph.D. in Support of Plaintiffs'
11 Opposition to Defendant Abbott Laboratories' Motion for Summary Judgment, and Cross-Motion
12 for Summary Judgment on Abbott's "Patent Immunity" Defense ("Greer Declaration").

13 **I. INTRODUCTION**

14 As they are required to do pursuant to Civil Local Rule 79-5 and the Stipulated Protective
15 Order in this case, Plaintiffs move, in the first instance, to lodge the above-referenced documents
16 under seal because they make reference to or constitute documents that have been designated by
17 Defendant Abbott Laboratories ("Abbott") as "highly confidential" or "confidential." *See* Civ. L.R.
18 79-5(d). However, with the exception of references to license agreements that actually merit sealing,
19 Plaintiffs request that the remaining materials be made part of the public record.

20 **II. THERE ARE NO "COMPELLING REASONS" WHY THE DOCUMENTS FILED
21 WITH OR REFERENCED IN PLAINTIFFS' PAPERS SHOULD BE SEALED.**

22 Under Civil Local Rule 79-5 and the Stipulated Protective Order (dated January 10, 2005),
23 Plaintiffs have an obligation to lodge under seal documents that Abbott has designated as
24 confidential. With the exception of the sealing of references to license agreements between Abbott
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1 and various other parties as previously ordered by this Court,¹ there is no basis for sealing the
2 remaining documents annexed to the Stocker Declaration or referenced in Plaintiffs' Opposition and
3 the Greer Declaration.

4 As the Ninth Circuit has noted, "courts have recognized 'a general right to inspect and copy
5 public records and documents, including judicial records and documents.'" *Kamakana v. City and
6 County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (citing *Nixon v. Warner Communs., Inc.*,
7 435 U.S. 589, 597, n.7 (1978)). "This right is justified by the interest of citizens in 'keeping a
8 watchful eye on the workings of public agencies.'" *Id.* "Unless a particular court record is one
9 'traditionally kept secret,' a 'strong presumption in favor of access' is the starting point." *Id.* (citing
10 *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)). Thus, "a party seeking to seal a judicial
11 record then bears the burden of overcoming this strong presumption by meeting the 'compelling
12 reasons' standard." *Kamakana*, 447 F.3d at 1178 (citing *Foltz v. State Farm Mut. Auto Ins. Co.*, 331
13 F.3d 1122, 1135 (9th Cir. 2003)). To meet this standard, a party must "articulate [] compelling
14 reasons supported by specific factual findings . . . that outweigh the general history of access and the
15 public policies favoring disclosure, such as the 'public interest in understanding the judicial
16 process.'" *Id.* at 1178-79 (citations omitted); accord *Pintos v. Pac. Creditors Ass'n*, 504 F.3d 792,
17 801 (9th Cir. 2007) (holding that a "compelling reasons" standard applies to most judicial records
18 and derives from the common law right to inspect and copy public records and documents).

19 The "compelling reasons" standard is necessary when determining whether to seal documents
20 filed with a dispositive motion. *Id.* at 802 (applying "compelling reasons" standard where
21 documents were filed along with a cross-motion for summary judgment). The "compelling reasons"
22 standard applies, even though these documents may have been previously filed under seal. As the
23 *Kamakana* court stated:

24 We adopted this principle of disclosure because the resolution of a dispute on the
25 merits, whether by trial or by summary judgment, is at the heart of the interest in
26 ensuring the "public's understanding of the judicial process and of significant public

27 ¹ See 3/6/08 Order Granting in Part Defendant's Motion to Seal (Docket No. 438). Plaintiffs agree
28 that these licensing agreements reflect negotiated terms and royalty rates between Abbott and third
parties, and reflect ongoing business relationships.

1 events.” . . . Thus “compelling reasons” must be shown to seal judicial records
2 attached to a dispositive motion. *The “compelling reasons” standard is invoked*
3 *even if the dispositive motion, or its attachments, were previously filed under seal*
or protective order.

4 447 F.3d at 1179 (citations omitted, emphasis added). *See also Foltz*, 331 F.3d at 1134 (“When
5 discovery material is filed with the court . . . its status changes.”). A “good cause” showing does not
6 suffice. *Pintos*, 504 F.3d 801-803; *Kamakana*, 447 F.3d at 1180.

7 When determining if a party has met the high burden of the “compelling reasons” standard,
8 “the court must ‘conscientiously balance[] the competing interests’ of the public and the party who
9 seeks to keep certain judicial records secret.” *Kamakana*, 447 F.3d at 1179 (citation omitted);
10 *Pintos*, 504 F.3d at 802. “After considering these interests, if the court decides to seal certain
11 judicial records, it must ‘base its decision on a compelling reason and articulate the factual basis for
12 its ruling, without relying on hypothesis or conjecture.” *Kamakana*, 447 F.3d at 1179 (citing
13 *Hagestad*, 49 F.3d at 1434).

14 “The mere fact that the production of records may lead to a litigant’s embarrassment,
15 incrimination or exposure to further litigation will not, without more, compel the court to seal its
16 records.” *Kamakana*, 447 F.3d at 1179 (citing *Foltz*, 331 F.3d at 1136). *See also In re Lifescan, Inc.*
17 *Consumer Litig.*, No. C 98 20321 JF, 1999 U.S. Dist. LEXIS 9894, at **7-8 (N.D. Cal. June 23,
18 1999) (“Indeed, common sense tells us that the greater the motivation a corporation has to shield its
19 operations, the greater the public’s need to know.”) (citation omitted).

20 Plaintiffs do not believe the documents and information at issue are entitled to be sealed
21 under the above standards. Abbott has consistently maintained that essentially all of the hundreds of
22 thousands of pages of documents it has produced herein are either “highly confidential” or
23 “confidential,” generally and vaguely claiming they contain “business strategies” or “strategic
24 business decisions.” However, these conclusory allegations do not give rise to “compelling
25 reasons.” *Kamakana*, 447 F.3d at 1182 (“conclusory offerings do not rise to the level of “compelling
26 reasons” sufficiently specific to bar the public access to the documents”); *In re Dynamic Random*
27 *Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2007 U.S. Dist. LEXIS 20570, at
28 **31-32 (N.D. Cal. Mar. 6, 2007) (denying defendants’ motion to seal where, despite defendants’

1 assertions that the documents contained proprietary information on, *inter alia*, pricing strategies, the
2 court found that “none of the documents actually appears to contain information directly revealing
3 such proprietary information”).

4 Moreover, most of the documents submitted with or referenced in Plaintiffs’ papers are four
5 to five-years old. Most deal with pricing strategies and decisions that have already been made
6 public. *Kamakana*, 447 F.3d at 1182 (noting that magistrate judge had determined that “deposition
7 testimony on confidential informants and criminal investigations was ‘years old’ and ‘largely
8 resulted in criminal indictments which were made public over three years ago”); *U.S. v. Exxon*
9 *Corp.*, 94 F.R.D. 250, 252 (D.D.C. 1981) (denying protection to documents containing internal
10 procedures and data that were several years old).

11 In addition, the public’s interest in having access to judicial filings is even more compelling
12 where the matters at issue affect the public as they do here. *In re Coordinated Pretrial Proceedings*
13 *in Petroleum Products Antitrust Litig.*, 101 F.R.D. 34, 38 (C.D. Cal. 1984) (“the interest in access to
14 court proceedings in general may be asserted more forcefully when the litigation involves matters of
15 significant public concern.”). Here, the public has a special interest in being informed of antitrust
16 claims alleging injury to consumers of drugs used to combat the HIV virus. *See e.g., California v.*
17 *Safeway, Inc.*, 355 F. Supp. 2d 1111, 1124 (C.D. Cal. 2005) (“The goal of the Sherman Act is ‘the
18 prevention of restraints to free competition in business and commercial transactions which tend[] to
19 restrict production, raise prices or otherwise control the market to the detriment of purchasers or
20 consumers of goods and services, all of which had come to be regarded as a special form of *public*
21 *injury*. . . . We find that the State’s representation of the public’s interest in access to a proceeding
22 involving the State’s allegations of *harm to the public* weighs especially in favor of access.”)
23 (citation omitted).

24 III. CONCLUSION

25 For the reasons set forth above, Plaintiffs respectfully request that the Court decline to permit
26 the filing under seal of the unredacted versions of the Stocker Declaration, Plaintiffs’ Opposition,
27 and the Greer Declaration concurrently lodged by Plaintiffs with this motion unless and until Abbott
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1 demonstrates under the "compelling reasons standard," such documents and information are entitled
2 to such treatment.

3 Dated: March 18, 2008

Respectfully submitted,

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